UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BONNIE T. FLAGG,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-45-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges disability stemming from esophageal problems, chest and back pain and depression and anxiety, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 19, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from degenerative disc disease and an affective disorder, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 21; that she lacked the residual functional capacity ("RFC") to lift and carry more than twenty pounds occasionally or more than ten pounds on a regular basis, to perform tasks requiring overhead reaching, to bend, squat, kneel or crawl more than occasionally, to work in extremes of heat or cold or to do work requiring more than occasional contact with co-workers, supervisors or the general public, Finding 5, *id.*; that she was unable to perform her past relevant work as a housekeeper and personal care attendant, Finding 6, *id.*; that considering her age (younger individual), education (high school) and RFC, she was able to make a successful vocational adjustment to work existing in significant numbers in the national economy, including employment as a courier/messenger, flagger, electronic equipment assembler, file clerk/record clerk and grader/sorter, Findings 8-11, *id.* at 21-22; and that she therefore had not been under a disability at any time through the date of decision, Finding 12, *id.* at 22.[2] The Appeals Council declined to review the decision, *id.* at 6-8, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be

[2] Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through at *(continued on next page)*

supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff argues that the administrative law judge erred in (i) failing to give appropriate weight to treating-physician opinions, in particular that of Kamlesh N. Bajpai, D.O., that the plaintiff was disabled from all employment, (ii) neglected to clarify the basis of Dr. Bajpai's opinion, thereby falling short in his overall duty to develop the record, (iii) arrived at an RFC that, with respect to both physical and mental capacities, is unsupported by substantial evidence of record, and (iv) relied for his Step 5 finding on flawed vocational-expert testimony. *See generally* Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 10). I find remand warranted on the basis that the administrative law judge's RFC finding is unsupported by substantial evidence of record. For the benefit of the parties on remand, I briefly address the plaintiff's remaining points of error.

I. Discussion

A. Physical RFC

least December 31, 2006, *see* Finding 1, Record at 21, there was no need to undertake a separate SSD analysis.

To be capable of performing a "full range" of light work, a claimant must be able to stand or walk, off and on, for a total of approximately six hours in an eight-hour workday. *See, e.g.*, Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 ("SSR 83-10"), at 29; *see also* 20 C.F.R. §§ 404.1567(b), 416.967(b). The administrative law judge implicitly found that the plaintiff retained this capability. *See* Finding 7, Record at 21.

Nonetheless, as the plaintiff points out, *see* Statement of Errors at 9 & n.3, that finding was unsupported by any RFC evaluation of record from an acceptable medical source. The record contains two physical RFC assessments. One, completed by a layperson "single decision maker" rather than a medical source, *see* Record at 81-82, 261-68, cannot be considered substantial evidence of RFC. The other, completed by Charles E. Burden, M.D., found that the plaintiff could stand and/or walk with normal breaks for a total of at least two-and-a-half hours in an eight-hour workday. *See id*. at 342, 348.

At oral argument, counsel for the commissioner posited that the administrative law judge properly could have discounted the Burden RFC on the basis that Dr. Burden gave "generous credit" for alleged pain – a credibility/pain finding at odds with that of the administrative law judge. *See id*. at 343. However, at Step 5, the record must contain positive evidence in support of the commissioner's findings regarding a claimant's RFC. *See, e.g., Rosado*, 807 F.2d at 294. Counsel for the commissioner was unable to point to any specific evidence of record demonstrating that the plaintiff retained the capacity to stand and/or walk for approximately six hours of an eight-hour workday. Accordingly, with respect to the plaintiff's ability to stand and/or walk, the administrative law judge's physical RFC finding was unsupported by substantial evidence.

As the plaintiff points out, *see* Statement of Errors at 11, this error filtered into the hypothetical questions the administrative law judge transmitted to vocational expert Sherry Watson at hearing,

undermining the relevance of her testimony, *see, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (responses of vocational expert are relevant only to extent offered in response to hypotheticals that correspond to medical evidence of record; "To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.").

As the plaintiff suggests, *see* Statement of Errors at 11, this was not harmless error. All but two of the jobs Watson identified in response to the administrative law judge's flawed hypothetical question require a capacity for light work. *See* Record at 76-79; Dictionary of Occupational Titles (U.S. Dep't of Labor, 4th ed. rev. 1991) ("DOT") §§ 206.367-014 (file clerk; light), 206.387-022 (record clerk; light), 206.387-034 (file clerk; light), 209.562-010 (general clerk; light), 209.567-014 (order clerk; sedentary), 209.667-014 (order caller; light), 230.663-010 (courier/messenger; light), 329.567-010 (office helper; light), 361.687-014 (classifier; light), 372.667-022 (flagger; light), 726.684-034 (electronic-equipment assembler; sedentary), 726.684-070 (electronic-equipment assembler; light).

Although Watson indicated that all of the jobs were entry-level, *see* Record at 76, one of the sedentary jobs (electronic-equipment assembler) is described as having a Specific Vocational Preparation, or SVP, of 3, which is inconsistent with unskilled work, *see* Social Security Ruling 00-4p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 00-4p"), at 245 ("Using the skill level definitions in 20 CFR 404.1568 and 416.968, unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9 in the DOT."). The administrative law judge failed to identify and resolve this conflict as required by SSR 00-4p. *See* SSR 00-4p, at 243 ("[B]efore relying on VE or VS evidence to support a disability

determination or decision, our adjudicators must . . . [i]dentify and obtain a reasonable explanation for any conflicts between occupational evidence provided by VEs or VSs and information in the [DOT]" and "explain in the determination or decision how any conflict that has been identified was resolved."). While Watson did identify one job that is both sedentary and unskilled – that of order clerk – the administrative law judge did not rely on it. *See* Record at 20.

B. Mental RFC

The commissioner prescribes a psychiatric review technique that adjudicators must follow in assessing whether, at Step 1, a claimant has medically determinable mental impairment(s); if so, whether, at Steps 2 and 3, such impairments are severe and meet or equal a Listing (a determination arrived at with the aid of a so-called Psychiatric Review Technique Form ("PRTF")); and, if one proceeds to Steps 4 and 5, the degree to which such impairments impact RFC (a so-called mental RFC assessment). *See* 20 C.F.R. §§ 404.1520a, 416.920a; *see also* Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 96-8p"), at 147 ("The adjudicator must remember that the limitations identified in the 'paragraph B' and 'paragraph C' criteria [of a PRTF] are not an RFC assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the sequential evaluation process. The mental RFC assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment[.]").

In this case, the administrative law judge implicitly adopted the PRTF findings of Disability Determination Services ("DDS") non-examining consultant Thomas A. Knox, Ph.D., with one change: whereas Dr. Knox found moderate difficulties in maintaining concentration, persistence or pace, the

administrative law judge assessed the plaintiff as having mild to moderate difficulties in that functional sphere. *Compare* Record at 18 *with id*. at 333.[3]

Nonetheless, the administrative law judge then implicitly rejected all but one of Dr. Knox's parallel mental RFC findings without acknowledgement or discussion of the discrepancy. Dr. Knox deemed the plaintiff (i) moderately to markedly limited in ability to understand and remember detailed instructions, (ii) moderately to markedly limited in ability to carry out detailed instructions, (iii) moderately limited in ability to maintain attention and concentration for extended periods, (iv) moderately limited in ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances, (v) moderately limited in ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, (vi) moderately to markedly limited in ability to interact appropriately with the general public, and (vii) moderately limited in ability to respond appropriately to changes in the work setting. *See id*. at 337-38.

He summarized: "She can understand + retain simple instructions + carry out simple tasks in 2-hr blocks throughout 8-hr days." *Id*. at 339. By contrast, the administrative law judge found only one mental RFC restriction: that the plaintiff could not perform work requiring more than occasional contact with co-workers, supervisors or the general public. *See* Finding 7, *id*. at 21.

[3] The plaintiff contends that the administrative law judge's PRTF finding that she suffered no episodes of decompensation is unsupported by the evidence inasmuch as she testified that she (i) had been depressed since childhood and (ii) developed a drinking problem that caused her to lose a couple of jobs before she attempted suicide and sought help. *See* Statement of Errors at 5. This plaint is without merit. The finding is supported by the Knox PRTF. *See* Record at 333. In addition, there is no evidence apart from the plaintiff's testimony that she lost jobs as a result of her drinking or that her drinking problem stemmed from depression.

I recognize that, at the PRTF stage, the administrative law judge found a lesser level of impairment in maintaining concentration, persistence or pace than had Dr. Knox. Nonetheless, one still would expect a mild to moderate impairment to translate into some functional restriction. An administrative law judge who adopts a DDS consultant's PRTF findings should be expected – absent a reasoned explanation – to embrace that consultant's parallel mental RFC findings. A reviewing court might forgive such an unexplained discrepancy as harmless error to the extent it is clear that the evidence of record nonetheless substantially supports an administrative law judge's mental RFC finding. But that is not the case here.

The Knox mental RFC evaluation stands as the only such evaluation of record. While a second non-examining DDS consultant, Peter G. Allen, Ph.D., completed a PRTF, he rated the plaintiff's mental impairment at Step 2 as non-severe and hence did not complete a mental RFC assessment (which is implicated only at Steps 4 and 5). *See id*. at 247-60. The administrative law judge evidently did not rely on the Allen PRTF, *see id*. at 16-22, and for good reason: The Allen PRTF, which was completed on June 6, 2002, *see id*. at 247, predated the report of DDS examining consultant Willard E. Millis, Jr., Ph.D., who evaluated the plaintiff in December 2002, *see id*. at 320-22.

Inasmuch as appears, the administrative law judge implicitly rejected much of the Knox mental RFC assessment primarily on the basis of his own reading of the Millis report (which Dr. Knox likewise had interpreted). *See id*. at 18-19. Such filtering of the raw medical evidence by a layperson can be risky business. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record"). For example, as the plaintiff observes, *see* Statement of Errors at 5 & n.2, the administrative law judge seized on Dr. Millis' finding of a Global Assessment of Functioning

("GAF") score of 70, which suggests mild impairment, but overlooked Dr. Millis' caveat that the plaintiff's functioning was intermittently impaired by depressive episodes, *see* Record at 322 ("Obviously, the problem is that these depressive issues seem to come every few weeks, a time when she is much less functional and effective than [i]s usually the case.").[4]

It is likewise troubling that the administrative law judge rejected, without explanation, Dr. Knox's finding that the plaintiff was limited to work entailing simple instructions. As Dr. Knox indicated, *see id*. at 339, this assessment was buttressed by Dr. Millis' determination that the plaintiff had a full-scale IQ of 76, placing her in the borderline range of intellectual functioning, *see id.* at 321; *see also, e.g.*, Social Security Ruling 85-16, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 ("SSR 85-16"), at 355 ("The evaluation of intellectual functioning by a program physician, psychologist, ALJ, or AC member provides information necessary to determine the individual's ability to understand, to remember instructions, and to carry out instructions. Thus, an individual, in whom the only finding in intellectual testing is an IQ between 60 and 69, is ordinarily expected to be able to understand simple oral instructions and to be able to carry out these instructions under somewhat closer supervision than required of an individual with a higher IQ. Similarly, an individual who has an IQ between 70 and 79 should ordinarily be able to carry out these instructions under somewhat less close supervision.").[5]

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[4] The GAF scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed., text rev. 2000). A GAF score in the range of 61 to 70 represents "[s]ome mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships." *Id*. (boldface omitted).

[5] Dr. Millis' own narrative regarding this point is difficult to comprehend; however, he seems to suggest that while the plaintiff is capable of understanding *detailed* instructions, that capacity is affected by intermittent attention and focus problems stemming from her anxiety and depression. *See* Record at 322.

The bottom line: There is a discrepancy between the administrative law judge's own findings at the PRTF and mental RFC levels. That discrepancy is unexplained, and its etiology is not sufficiently clear to a layperson that one can be confident that the mental RFC finding is supported by substantial evidence of record.

As the plaintiff suggests, this error (like that committed with respect to physical RFC) cannot fairly be described as harmless. *See* Statement of Errors at 11-13. As she points out, a claimant limited to the performance of jobs entailing only simple instructions (as found by Dr. Knox) would be incapable of performing any of the jobs identified by Watson, all of which have General Educational Development ("GED") reasoning levels of 2 or 3. *See id*. at 12; *see also* DOT §§ 206.367-014 (file clerk; level 3), 206.387-022 (record clerk; level 3), 206.387-034 (file clerk; level 3), 209.562-010 (general clerk; level 3), 209.567-014 (order clerk; level 3), 209.667-014 (order caller; level 2), 230.663-010 (courier/messenger; level 2), 329.567-010 (office helper; level 2), 361.687-014 (classifier; level 2), 372.667-022 (flagger; level 2), 726.684-034 (electronic-equipment assembler; level 3), 726.684-070 (electronic-equipment assembler; level 3); Appendix C, § III to DOT (while a job with a GED reasoning level of 1 requires a worker to "[a]pply commonsense understanding to carry out simple one- or two-step instructions" and to "[d]eal with standardized situations with occasional or no variables in or from these situations encountered on the job," a job with a GED reasoning level of 2 requires a worker to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions" and to "[d]eal with problems involving a few concrete variables in or from standardized situations[,]" and a job with a GED reasoning level of 3 requires a worker to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form" and to "[d]eal with problems involving several concrete variables in or from standardized situations.").

C. Other Points

For the benefit of the parties on remand, I briefly comment on the plaintiff's remaining points of error:

1. **Treatment of Treating Physician**. As the plaintiff points out, *see* Statement of Errors at 5-7, the administrative law judge ignored an opinion twice expressed by Dr. Bajpai that the plaintiff was disabled from any work, *see* Record at 269, 271. This was error. Although the administrative law judge was not obliged to accord any "special significance" to Dr. Bajpai's opinion inasmuch as it concerned the ultimate question of disability (a determination reserved to the commissioner), s*ee* 20 C.F.R. §§ 404.1527(e)(1)-(3), 416.927(e)(1)-(3), he was not free simply to ignore it and was required to explain the consideration given it, *see* Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 96-5p"), at 124, 127. He did not do so, and that error should be rectified on remand.[6]

2. **Failure To Develop Record**. The plaintiff posits that the administrative law judge erred in failing to contact Dr. Bajpai for clarification of the basis of his opinion. *See* Statement of Errors at 7-8. This argument is without merit. The duty to recontact a treating physician for clarification of the basis of a treating source's opinion on an issue reserved to the commissioner is triggered only when (i) "the evidence does not support a treating source's opinion" and (ii) "the adjudicator cannot ascertain the basis of the opinion from the case record[.]" SSR 96-5p, at 127. The administrative law judge did not even acknowledge the existence of the Bajpai opinion. He may have done so because he overlooked it; he may have done so because, although he could discern its bases, he found it inconsistent with other evidence of

[6] I need not, and do not, consider whether this error standing alone would have justified remand.

record. I am unwilling simply to speculate that he did so because he could not ascertain the basis of the opinion from the record.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of November, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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